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NO. 90-1880

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

JOSEPH LEHMAN, Commissioner of the Pennsylvania Department of Corrections; CHARLES ZIMMERMAN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; JAMES J. HAGGERTY, General Counsel of Pennsylvania; and ERNEST D. PREATE, JR., Attorney General of the Commonwealth of Pennsylvania,

Petitioners

v.

JOHN CHARLES LESKO,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

1. Respondent, John Charles Lesko, is indigent. He has previously sought and obtained leave to proceed in forma pauperis in both the federal district for the Western District of Pennsylvania and the Third Circuit Court of Appeals.

2. Respondents' attorneys, Rabe F. Marsh, III, Esq. and Welsh S. White, Esq. were appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(d)(6), as amended, by Judge Alan N. Bloch of the Western District of Pennsylvania.

WHEREFORE, Respondent prays that this Court grant him leave to proceed in forma pauperis.

Respectfully submitted,

Welsh S. White

Welsh S. White
Attorney for Respondent

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Petitioners

v.

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SUPREME COURT, U.S.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Third Circuit deviated from established Fifth Amendment case law in holding that the prosecutor's comment on respondent's failure to testify about the crime at his capital penalty trial was constitutionally impermissible?

II. Whether the Third Circuit's application of these established principles to the particular facts of respondent's case constituted a "new rule" within the meaning of Teague v. Lane, 489 U.S. 288 (1989)?

III. A. Whether the Third Circuit erred in rejecting the Pennsylvania Supreme Court's legal conclusion that the prosecutor's penalty-trial arguments were federally constitutional?

III. B. Whether the Third Circuit erred in concluding that, on the facts of record, the prosecutor's closing arguments rendered the respondent's penalty trial fundamentally unfair?

IV. Whether the Third Circuit erred in holding that an evidentiary hearing was required to resolve respondent's claim that the use of a prior guilty plea as evidence in aggravation at his penalty trial was unconstitutional because that plea was entered as a result of a plea

agreement which induced respondent to believe that such use was specifically forbidden?

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STATEMENT OF THE CASE

Respondent and Michael Travaglia were charged in Westmoreland County, Pennsylvania, with the first degree murder of a police officer, Leonard Miller, on January 3, 1980. Travaglia had shot Officer Miller twice from close range with a .38 caliber handgun after Officer Miller stopped a car driven by Travaglia in which respondent and another man, Ricky Rutherford, were passengers.

Prior to their joint trial in Westmoreland County, respondent and Travaglia each entered guilty pleas to second degree murder charges in Indiana County, Pennsylvania, involving the earlier killing of William Nichols.

Respondent did not testify at the guilt phase of his Westmoreland County trial. Based on respondent's statement to the police some time after the crime, respondent's trial attorney argued that respondent had not contemplated the killing of Officer Miller and, therefore, was at most guilty of second degree murder on the basis of Pennsylvania's felony-murder rule. The jury nevertheless found both respondent and Travaglia guilty of first degree murder.

At the sentencing hearing which followed, the prosecutor introduced respondent's Indiana County guilty plea as an aggravating factor. Respondent objected to this evidence on the ground that, under his plea agreement with the District Attorney of Indiana County, the plea was entered there with the express understanding that it would not be introduced into evidence at the Westmoreland County trial. Respondent requested, but was

denied, an opportunity to establish the facts relating to this plea agreement.

During the penalty phase of his trial, respondent testified for the limited purpose of describing his deprived childhood. Respondent's counsel introduced this evidence for the purpose of establishing a mitigating circumstance relating to respondent's personal background. The prosecutor did not cross-examine.

During his closing penalty argument, the prosecutor focused on respondent's failure to admit his crime during his penalty trial testimony. He said,

> And I want you to consider that. John Lesko took the witness stand, and you've got to consider his arrogance. He told you how rough it was, how he lived in hell, and he didn't even have the common decency to say I'm sorry for what I did. I don't want you to put me to death, but I'm not even going to say that I'm sorry. Tr. at 1697.

In addition, the prosecutor stated that he could not stop the jury from showing sympathy to the defendants and continued:

> So I'll say this: Show them sympathy. If you feel that way, be sympathetic. Exhibit the same sympathy that was exhibited by these men on January 3rd, 1980. No more. No more.
>
> I want you to remember this: We have a death penalty for a reason. Right now, the score is John Lesko and Michael Travaglia two, society nothing. When will it stop? When is it going to stop? Who is going to make it stop? That's your duty. Tr. at 1701-02.

Both of these arguments were objected to by respondent. The trial judge overruled both objections. In his jury instructions, he told the jurors that their decision should not be based on sympathy. The jury returned a sentence of death for

respondent, finding that the aggravating circumstances outweighed the mitigating circumstances.

After respondent was sentenced to death for his part in the murder of Officer Miller, John Armstrong, respondent's Indiana County attorney, moved to withdraw respondent's Indiana County guilty plea on the ground that the underlying plea agreement had been breached when the plea was introduced as an aggravating circumstance in the penalty phase of the Westmoreland County trial. At a hearing on the motion to withdraw the plea, Armstrong presented no testimony but made a statement to the court. Armstrong stated that the introduction of the Indiana County guilty plea in the Westmoreland County capital trial violated the plea agreement because the essence of the agreement was that the plea was not to be introduced at that trial. The District Attorney of Indiana County then testified that he never promised anyone that the Indiana County guilty plea would not be used in the Westmoreland County trial. The Indiana County Court denied the motion to withdraw respondent's guilty plea. It limited its consideration of the plea agreement to the terms expressly stated in the plea colloquy, and it found that these terms did not overtly include any promise of non-use of the plea in Westmoreland County. On appeal, the Pennsylvania Supreme Court affirmed, adopting similar reasoning.

The Pennsylvania Supreme Court also affirmed respondent's Westmoreland County conviction and death sentence. Later, respondent filed a petition for post-conviction relief, asking the Westmoreland County court to hold a hearing on respondent's

claim that the introduction of his Indiana County guilty plea at the Westmoreland County penalty trial violated the terms of the Indiana County plea agreement. Although respondent had witnesses present to testify on these matters, the court refused to conduct a hearing. The Pennsylvania Supreme Court affirmed.

Petitioners accurately summarize the subsequent history of the case.

REASONS FOR DENYING THE WRIT

I. The Third Circuit's Application of Established Fifth Amendment Rules to the Particular Facts of This Case, in Which the Prosecutor Unmistakably Commented on the Respondent's Failure to Testify About the Crime at the Penalty Trial, Presents No Issue Warranting Certiorari

Petitioners frame their first issue as whether the prosecutor properly "comment[ed] on the defendant's failure to express remorse." Petition, Question Presented I. This enables them to manufacture a supposed conflict between the decision below and cases said to "have permitted a prosecutor's comment during the penalty phase on a defendant's lack of remorse." Petition, 42. But the Third Circuit explicitly did "not reach the broad question [posited by petitioners] of whether, and to what extent, a defendant's demeanor is relevant to the sentencing determination in a death penalty case, because . . . the prosecutor's comments in this case were [not] a simple reference to demeanor," Appendix, p. 37a; they were adverse comment on "Lesko's failure to testify about his role in the events surrounding the Miller homicide," id., pp. 37a-38a.[1]

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[1]Petitioners complain that the Third Circuit "rejected the state supreme court's determination that the 'no remorse' comment was a reference to Lesko's demeanor." Petition, p. 56. But this was perfectly proper and presents no issue for certiorari. The federal constitutionality of a prosecutor's arguments to the jury, like the federal constitutionality of a judge's instructions to the jury, depends on how the spoken words would be understood in context. That is not a factual question on which a federal habeas corpus court should defer to state-court fact-finding (see Part III.A infra); it is a classic question of judgment in the application of federal constitutional standards which a federal court must decide independently. See, e.g., Sandstrom v. Montana, 442 U.S. 510, 516-17 (1979); Francis v. Franklin, 471 U.S. 307, 316 (1985); and see Yates v. Evatt, 59 U.S.L.W. 4509, 4512 (U.S., May 28, 1991.)

The thrust of the prosecutor's argument was that the jury should consider Lesko's "arrogance" in testifying about his background and not even having the "common decency to say I'm sorry for what I did." Appendix, 37a (emphasis supplied). As the Third Circuit indicated, "[t]o the jury, the natural and necessary interpretation of these comments would be that Lesko had a moral or legal obligation to address the charges against him -- indeed to apologize for his crimes -- during his penalty phase testimony, and that the jury could and should punish him for his failure to do so." Appendix, 37a. Thus, the issue presented by this record is whether the prosecutor violated the Fifth Amendment privilege by commenting on respondent's failure to testify about the crime at the penalty trial.

Properly understood, this Fifth Amendment issue is a narrow one. It concerns only the propriety of a prosecutor's asking the jury to base a death sentence partly upon "the defendant's failure to testify about the substance of the charges against him" when he takes the stand at a penalty trial for the limited purpose of relating his childhood history as a circumstance in mitigation. Appendix, 35a. Neither this nor any similar issue has produced conflicting decisions among the lower courts, despite petitioners' claim of such conflict.[2] Rather it is an issue that other courts have found no occasion to decide -- an

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[2]The cases cited by petitioners deal with prosecutorial argument about the defendant's lack of remorse, not about the defendant's failure to testify concerning the crime. In most of these cases, the prosecutor argued the defendant's lack of remorse on the basis of his "observable demeanor" at trial. See, e.g., State v. Price, 326 N.C. 56, 85, 388 S.E.2d 84, 100 (1990).

apt indication of its general lack of significance in the administration of capital trials.

Moreover, contrary to petitioners' assertion, the ruling below is not inconsistent with the applicable decisions of this Court. On the contrary, each aspect of the Third Circuit's analysis is solidly supported by this Court's decisions.

Under Griffin v. California, 380 U.S. 609 (1965), the prosecutor is barred by the Fifth Amendment from commenting on a defendant's failure to testify at trial. Griffin's rationale was that a prosecutor's comment imposes an impermissible burden on the defendant's exercise of his Fifth Amendment privilege.[3] In the present case, the Third Circuit properly asked, first, whether Griffin applied to respondent's penalty trial, and, second, whether respondent waived his Fifth Amendment protection by testifying for the limited purpose of explaining his background and personal history.

The Third Circuit read Estelle v. Smith, 451 U.S. 454 (1981), as holding that a capital defendant's Fifth Amendment privilege applies at the penalty stage. Plainly, this is correct. Although petitioners intimate that the determination of guilt diminishes the scope of the privilege, Petition, 45, this Court in Smith stated that it could

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[3]The Court has consistently "interpreted the Fifth Amendment guarantee against self-incrimination to mean that comment on the failure to testify was an unconstitutional burden on the basic right." United States v. Hasting, 461 U.S. 499, 507 (1983). See, e.g., Lakeside v. Oregon, 435 U.S. 333, 336-339 (1978); Jenkins v. Anderson, 447 U.S. 231, 235 (1980); Carter v. Kentucky, 450 U.S. 288, 297-301 (1981).

> discern no basis to distinguish between the guilt and penalty phases of the respondent's murder trial so far as the protection of the Fifth Amendment is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental guarantees. Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment. 451 U.S. at 462-63.[4]

The Third Circuit was equally correct in concluding that this Court's decisions establish that "a criminal defendant does not completely waive the Fifth Amendment privilege by testifying solely on collateral or preliminary matters." Appendix, 34a. In United States v. Nobles, 422 U.S. 225, 240 (1975), the Court stated the rule to be that a defendant who testifies in his own behalf waives his "Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination" (emphasis supplied). It has long been settled that a defendant who testifies as to a collateral matter retains his Fifth Amendment privilege with respect to matters not

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[4]Again, petitioners labor to portray a debate in the lower courts where none exists. Apparently, every court that has considered the question has accepted the principle that Griffin applies at the penalty stage of a capital case. See, e.g., People v. Taylor, 276 Cal. Rptr. 391, 404, 52 Cal. 3d 719, ___, 801 P.2d 1142, 1155 (1990); People v. Ramirez, 98 Ill. 2d 439, 75 Ill. Dec. 241, 457 N.E.2d 31 (1983), cert. denied, 481 U.S. 1053 (1987). Petitioners' assertion that State v. Jeffries, 105 Wash. 2d 398, 717 P.2d 722 (1986) "suggested" that Griffin may not apply at the penalty trial (Petition, 49) is incorrect. Jeffries found that a prosecutor's comment on a defendant's penalty trial testimony was not in violation of Griffin because the defendant was testifying as to the merits of the charge against him. See 717 P.2d at 732-33. The court thus clearly accepted the principle that Griffin applies at the penalty trial.

reasonably related to his testimony. E.g., Brown v. Walker, 161 U.S. 591, 597-598 (1896).

Simmons v. United States, 390 U.S. 377 (1968), and its progeny demonstrate the point. Simmons held that a defendant's testimony at a pretrial motion to suppress may not be admitted against him at trial. This holding, which has been reaffirmed by later decisions, see, e.g., Brown v. United States, 411 U.S. 223, 228 (1973); United States v. Salvucci, 448 U.S. 83, 89-90 (1980), recognized that a defendant must be permitted to present evidence in vindication of a distinct constitutional right without being required to waive his Fifth Amendment privilege. See, 390 U.S. at 976. Under the Eighth Amendment, a capital defendant has a constitutional right to introduce mitigating evidence unrelated to the crime at his penalty trial. See, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 481 U.S. 393 (1987). In doing so, he does not waive the Fifth Amendment privilege except within the boundaries set by the time-honored rules of cross-examination -- that is, with respect to matters reasonably related to his penalty trial testimony. Thus, the Third Circuit's finding that respondent did not waive his Fifth Amendment protection under Griffin by testifying solely about his childhood history at the penalty trial was entirely consistent with this Court's decisions.

II. Petitioners' Suggestion That the Third Circuit Announced a "New Rule" Within the Meaning of Teague v. Lane, 489 U.S. 288 (1989), Does Not Merit Certiorari

The Third Circuit's holding on the Fifth Amendment issue did not announce a new rule but rather applied an established rule to a unique situation. As explained in the previous argument, Griffin v. California, 380 U.S. 609 (1965), established that the Fifth Amendment prohibits a prosecutor from commenting on a criminal defendant's failure to testify about the crime at trial, and Estelle v. Smith, 451 U.S. 454 (1981), established that the defendant's Fifth Amendment protection extends to the penalty stage of a capital case. Drawing upon these two established rules, the Third Circuit found that the Fifth Amendment privilege bars a prosecutor from commenting on a capital defendant's failure to testify about the crime at the penalty stage.

Petitioners confuse this reasoning from settled rules with the elaboration of a new rule. Petition, 52-53. But the two are not the same under the approach to retroactivity that Teague derived from Justice Harlan's Mackey and Desist opinions. See Teague v. Lane, 489 U.S. 288, 305-10 (1989), citing Mackey v. United States, 401 U.S. 667, 692 (1971) (separate opinion of Harlan, J.), and Desist v. United States, 394 U.S. 244, 256-57 (1969) (Harlan, J., dissenting). Under this approach, a new rule is not announced when a court "'simply applie[s] a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.'" Penry v. Lynaugh, 492 U.S. 302, 314 (1989), quoting from Mackey, supra, 401 U.S. at 695 (separate

opinion of Harlan, J.), quoting Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting). Moreover, in Penry v. Lynaugh, supra, and Saffle v. Parks, 110 S. Ct. 1257 (1990), this Court explicated the difference between announcing a new rule and applying an existing principle. It is unnecessary for the Court to revisit the subject in this case.

Here, Griffin had long established the Fifth Amendment principle that a prosecutor may not comment on a criminal defendant's failure to testify at trial. Griffin is consistently recognized as barring prosecutorial comment on a defendant's failure to testify about the charges against him when the defendant testifies to a collateral issue at trial. See, e.g., McGahee v. Massey, 667 F.2d 1357, 1363 (11th Cir. 1982) (dicta); Calloway v. Wainwright, 409 F.2d 59 (5th Cir. 1969), cert. denied, 395 U.S. 909 (1969) (holding). Once Estelle v. Smith held that there is "no basis to distinguish between the guilt and penalty phases of . . . [a] murder trial so far as the protection of the Fifth Amendment is concerned," 451 U.S. at 462, the application of Griffin to the situation of a defendant testifying to a collateral issue at his penalty trial became simply a matter of applying an established constitutional principle to a factually new but logically indistinguishable case.[5]

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[5]Petitioners' assertion that Tucker v. Francis, 723 F.2d 1504, 1509-10 (11th Cir. 1984), aff'd sub nom. Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986) "reject[ed] a similar challenge," Petition, p. 53, is inaccurate. As the Third Circuit stated: "The Tucker court held that because defendant had testified on the merits of the charge against him during the penalty phase, prosecutorial comment on defendant's failure to testify during the guilty phase was

III. A. The Question Whether a Federal Habeas Court Must Accept the State Supreme Court's Legal Conclusions Regarding a Federal Constitutional Claim Does Not Merit Certiorari

Petitioners object to the Third Circuit's reaching a different result than the Pennsylvania Supreme Court on the issue of whether the prosecutor's argument rendered respondent's penalty trial fundamentally unfair in violation of due process, despite the fact that both courts apparently applied the same legal standard. Petition, 56. Petitioners state that "[t]he role of the lower federal courts in administering the writ of habeas corpus is to protect basic rights. They do not sit to review the decisions of the state courts." Petition, 57.

It is, of course, true that the federal courts on habeas do not review all decisions of state courts. Nevertheless, it has been established since Brown v. Allen, 344 U.S. 443 (1953), that a federal habeas court must independently apply the correct constitutional standard to the historical facts underlying a federal constitutional claim. Although it is sometimes difficult to determine whether a particular issue is a legal question (or a mixed question of law and fact) as opposed to a factual question, see, e.g., Miller v. Fenton, 474 U.S. 104, 113-14 (1985), in habeas cases it is clear that "legal question[s] require independent federal determination." Miller v. Fenton, supra, at

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permissible. However, the court stated that, under Calloway, '[h]ad the appellant limited his presentence testimony to biographical mitigating factors this case might be susceptible of a 'collateral matter' or partial waiver limitation.' 723 F.2d at 1514 (emphasis added)." Appendix, 36a, n.15.

110. See also Mincey v. Arizona, 437 U.S. 385, 398 (1978); Haynes v. Washington, 373 U.S. 503, 515-16 (1963).

In the present case, the question whether the prosecutor's closing argument rendered the penalty trial fundamentally unfair is clearly a legal question. Petitioners do not contend otherwise. In deciding this question, the Third Circuit independently applied the correct constitutional standard to the prosecutor's words as recorded in the trial transcript. This unremarkable procedure provides no occasion "to reevaluate the role of the lower federal courts in reviewing the decisions of the state courts." Petition, 57.

III B. Petitioners Offer No Reason Why This Court Should Review the Third Circuit's Determination that the Prosecutor's Argument Rendered Respondent's Penalty Trial Fundamentally Unfair

The Third Circuit concluded that the prosecutor's closing argument was improper in two respects: first, the prosecutor's comment relating to respondent's failure to admit his guilt violated his Fifth Amendment privilege; second, the prosecutor's "appeal to vengeance," see Appendix, 29a, urged the jury to act upon matters that could not properly be considered as aggravating circumstances, and was "calculated to incite an unreasonable and retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence." Appendix, 40-41a. The court then concluded that in combination these two errors rendered respondent's penalty trial fundamentally unfair under

the standard articulated by this Court in Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974).

The Third Circuit's ruling was fact-specific. In reaching its decision, the court examined not only the precise language of the prosecutorial arguments but also the context in which they were made, see, Appendix, 28a-31a, 36a-42a, the trial judge's charge, Appendix, 43a-44a, and the nature and weight of the prosecution and defense evidence before the jury, Appendix, 43a. Because the Third Circuit's holding was so particularistic, its significance is limited to the case at bar.

Moreover, there are no other reasons why this Court should consider such a fact-bound issue. Except for pointing out that the Third Circuit and the Pennsylvania Supreme Court reached different results with respect to the same issue (a conflict which inevitably follows from the grant of the writ), petitioners do not even contend that the Third Circuit's ruling was in conflict with decisions by other federal or state courts or that it conflicts with the applicable decisions of this Court.

In fact, the Third Circuit's ruling is entirely consistent with those decisions. In Darden v. Wainwright, 477 U.S. 168 (1986), the Court considered a case in which the prosecutor made improper arguments during the guilt phase of a capital case. In holding that the argument did not render the proceedings fundamentally unfair under the standard of Donnelly v. DeChristoforo, supra, the Court emphasized that the prosecutor's argument did not "implicate other specific rights of the accused such as . . . the right to remain silent." 477 U.S. at 181-82.

The Court observed that much of the objectionable argument "was invited by or responsive to the opening summation by the defense." 477 U.S. at 182. In determining whether the argument rendered the proceedings fundamentally unfair, the Court examined the strength of the evidence against the defendant, the effect of defense counsel's closing argument, and the judge's charge. 477 U.S. at 182.

In concluding that the prosecutor's argument in the present case rendered the proceedings fundamentally unfair in violation of DeChristoforo, the Third Circuit found that the argument did violate the defendant's constitutional right to remain silent. See Appendix, 31-39a. The court concluded that the prosecutor's improper remarks were not invited by the defense. See Appendix, 39a, n.17. It closely examined the entire record, including the effect of the judge's charge. See Appendix, 43-44a. Thus, the Third Circuit meticulously applied the controlling decisions of this Court. It is unnecessary for the Court to review its decision.

IV. Certiorari Should Not Be Granted to Review the Third Circuit's Decision that the Current State of the Record Called for a Hearing on Respondent's Claim that his Indiana County Guilty Plea Was Induced by an Assurance that It Would Not Be Used Against Him in his Westmoreland County Trial

After delineating the complex history of the state court proceedings in this case, Appendix, 9a-16a, and carefully exploring the implications of those proceedings, Appendix, 25a-28a, the Third Circuit concluded that respondent was entitled to an evidentiary hearing on the question whether the use of his

Indiana County guilty plea in aggravation at the penalty phase of his capital trial violated due process because the plea had been induced by an agreement which assured respondent specifically against such use.

Petitioners argue that this ruling was incorrect because respondent "bypassed" an opportunity to present the proofs relevant to his claim "at the time of the hearing on his motion to withdraw his guilty plea" in Indiana County. Petition, 60. Thus, the record is said to present the issue of when a state defendant's deliberate bypassing of state procedures forfeits his right to a hearing in the federal courts. Petition, 61-62.

But the record does not, in fact, present that issue. Petitioners misconceive the basis on which the Third Circuit held that a hearing was necessary to resolve respondent's claim. The Third Circuit did not disregard the fact that respondent presented no evidence on his Indiana County motion to withdraw the guilty plea. It held simply that the hearing on the motion to withdraw the guilty plea made by respondent's Indiana County counsel did not address the due process claim raised by respondent's present counsel, and that this due process claim involved factual issues that could therefore not be resolved on prior counsel's motion to withdraw his guilty plea. Appendix, 27a.[6] Respondent subsequently sought to present evidence on his

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[6]The Third Circuit's conclusion on this point is hardly surprising. In considering respondent's motion to withdraw his guilty plea in Indiana County, the Indiana County court did not and could not address the question whether the Indiana County guilty plea could be properly admitted at respondent's capital trial in Westmoreland County. The questions whether a

due process claim in the Westmoreland County court, but that court refused to receive it. See Appendix, 15a.

The Third Circuit's ruling that an evidentiary hearing is required under these circumstances is based on its detailed analysis of the unique record of this case. In reaching its result, the Third Circuit diligently applied the criteria of Townsend v. Sain, 372 U.S. 293, 312 (1963), and 28 U.S.C. § 2254(d). It did not establish any new principles of law or reach a result that was even arguably inconsistent with that reached by any other federal court. Accordingly, no reason appears for this Court to review the Third Circuit's decision on the issue.

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defendant's guilty plea should be vacated and whether he is entitled to have the Commonwealth perform in accordance with the terms of a plea bargain are separate and distinct. See Santobello v. New York, 404 U.S. 257, 263 (1971). In addition, as the Third Circuit indicated, the motion filed by respondent's Indiana County counsel to withdraw his Indiana County plea did not raise the question whether the plea was "involuntary" because it was entered with a misunderstanding, based on Indiana County counsel's representations, that the plea agreement specifically forbade the plea to be introduced at the subsequent capital trial in Westmoreland County. See Appendix, 22a-25a, 27a.

CONCLUSION

For the foregoing reasons, certiori should be denied.

Respectfully submitted,

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Petitioners

v.

JOHN CHARLES LESKO,

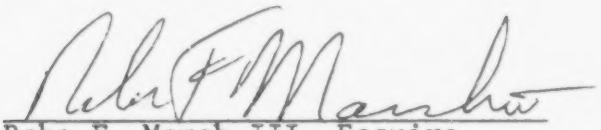
Respondent

CERTIFICATE OF SERVICE

I, Rabe F. Marsh III, Esquire, a member of the Bar of the Supreme Court of the United States, and appointed counsel for Respondent, do hereby certify that all parties required to be served have been served with a true copy of the within Motion for Leave to Proceed In Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, pursuant to Rule 29.3, by depositing on June 26, 1991, true and correct copies of said

documents in the United States Post Office at Greensburg, Pennsylvania, by first class mail, postage prepaid, addressed to counsel of record for Petitioners:

Robert A. Graci, Esquire
Chief Deputy Attorney General
Appeals and Legal Services Section
16 Strawberry Square
Harrisburg, PA 17120



Rabe F. Marsh III, Esquire
15 North Main Street
Greensburg, PA 15601
(412) 834-2100
Counsel for Respondent,
John Charles Lesko

Dated: June 26, 1991

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B. PATRICK COSTELLO
RABE F. MARSH III
JOHN N. WARD
L. CHRISTIAN DeDIANA

JUNE 26, 1991

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Joseph F. Spaniol, Jr., Clerk
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Joseph Lehman et al.
v. John Charles Lesko
No. 90-1880 In The Supreme
Court of the United States
Our File No. 07767.00006

Dear Sir:

Please find enclosed for filing the Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Also enclosed is respondent's Motion for Leave to Proceed In Forma Pauperis.

Lastly, I enclose the Certificate of Service that the Brief and Motion were served on counsel for petitioners.

Very truly yours,

Rabe F. Marsh III

RFM/cch
Enclosures

cc: (W/ENCLOSURES)
Robert A. Graci, Esquire